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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Nos. 71-489 and 71-550

AMERICAN AIRLINES, INC.,
Petitioner,
and
ALLIED PILOTS ASSOCIATION,
Intervenor-Petitioner,
against
CIVIL AERONAUTICS BOARD,
Respondent,
and
MASTER EXECUTIVE COUNCIL OF THE PILOTS OF TRANS CARIBBEAN AIRWAYS,
Intervenor-Respondent.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION FOR THE RESPONDENT MASTER EXECUTIVE COUNCIL OF THE PILOTS OF TRANS CARIBBEAN AIRWAYS

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OPINIONS BELOW

The opinion of the Court of Appeals (Appendix of Petition in No. 71-489, page A12-A24)[1] is reported at

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[1] The numbered pages of the Appendix of the Petition in No. 71-489 are referred to hereinafter as App. A1, App. A2, etc.

445 F.2d 891. The findings and orders of the Civil Aeronautics Board (App. A25-A40) are not yet reported.

QUESTIONS PRESENTED

1. Whether the Civil Aeronautics Board has the authority, in approving an airline merger under section 408(b) of the Federal Aviation Act, to impose labor protective conditions which assure to responsible employee groups the right to binding arbitration of seniority disputes arising out of the merger.

2. Whether the Board acted reasonably in ordering arbitration in this case.

3. Whether the Board in ordering such arbitration may bind an employee group which has actively participated in the Board proceedings leading to the issuance of the order.

STATUTES INVOLVED

Pertinent provisions of the Federal Aviation Act of 1958, as amended (the "Act"), the Administrative Procedure Act, the Railway Labor Act, the Reorganization Plan No. 3 of 1961, 26 F.R. 5989, and the Regulations of the Civil Aeronautics Board, are set forth in the Appendix to the Petition for Certiorari in No. 71-489, at pages A1-A11.

In addition, 45 U.S.C. 157, First (Sec. 7, First, of the Railway Labor Act) provides:

> "First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in the preceding sections, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a

board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however,* That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise."

STATEMENT

In lieu of a complete restatement of the factual background of the present controversy, Respondent Master Executive Council of the Pilots of Trans Caribbean Airways (TCA-MEC) accepts and endorses the statement thereof by Respondent Civil Aeronautics Board (Board) in its Brief in Opposition. There are, however, two points which require clarification.

First. The Petitions of American Airlines, Inc. (American) in No. 71-550 and of the Allied Pilots Association (APA) in No. 71-489 may create the impression that all three parties (American, APA and TCA-MEC) sought to have the Board, rather than an arbitrator, integrate the seniority lists. In fact, American did not propose a proceeding to integrate the seniority lists, but rather a proceeding to determine what *procedures* should be followed for resolving any outstanding disputes. Record 206a, p. 12.[3] This issue had already been decided in the order of the Board approving the merger, with arbitration chosen by the Board. TCA-MEC vigorously objected to American's proposal. Record 210a, p. 2. While TCA-MEC reluctantly indicated its willingness to have the Board itself integrate the seniority lists, this was done only after American had refused to comply with the arbitration condition it had voluntarily accepted, and after

[3] "Record" refers to the Joint Appendix filed by the parties in the court of appeals. The Joint Appendix has been filed with the Clerk of this Court.

American and APA had seemingly indicated a willingness to be bound by a Board integration. Record 210a, pp. 10, 11. Moreover, TCA-MEC's willingness was, in terms, predicated on the delays incident to "APA['s] . . . threat that it will refuse to arbitrate no matter what the Board says." Record 175a, p. 19.

Second. Although TCA-MEC does not propose here to recite or argue the facts relating to the merits of the seniority question, it must take vigorous exception to the statement in American's Petition (Pet. No. 71-550, 15) that "important concessions" were made by APA during the abortive negotiations. The facts are directly contrary —despite several concessions made by TCA-MEC, the APA adamantly adhered to its original position on the seniority issue throughout the negotiations.

REASONS FOR DENYING THE WRIT

Petitioners concede that the Board has power to impose protective labor conditions in airline merger cases, including conditions for the integration of seniority lists. In our view, and in the view of the Board and the Court below, the basic issue on the merits of this litigation is whether the Board's choice of binding arbitration as the means of integrating the seniority lists of two merging carriers in the absence of agreement, as opposed to integrating the lists itself, was permissible as a proper exercise of its discretion. The court below found that the Board's choice of arbitration was a proper exercise of discretion in the circumstances. In the light of the requirements of Rule 19, Petitioners' plea that this Court review that determination is not a sufficient basis for invocation of this Court's power of discretionary review.

1. *No significant questions concerning national labor policy are raised by the Board's procedures or by the Board's refusal to consider an agreement between two parties to a tripartite labor dispute.*

Petitioner APA argues (Pet. No. 71-489, 9) that the agreement between APA and American (APA-AA agreement), allegedly a valid collective bargaining agreement within the meaning of the Railway Labor Act, was unlawfully "ignored" by the Board.

Petitioner's entire argument is erroneously founded on the premise that the procedures established by the Board for negotiation, agreement, and arbitration between employee groups (plural) and the employer are or should be the same procedures as those provided in the Railway Labor Act.[3]

The Board's undisputed power to impose protective labor conditions derives from Section 408 of the Federal Aviation Act, 49 U.S.C. 1378, and not from the Railway Labor Act. Although, as we shall show, the Board's labor conditions are consistent with the national labor policy, the conditions make provision for negotiations between two or more employee groups (which usually have conflicting interests) and the employer, rather than bi-partite negotiations between employee representatives and the employer as contemplated in the typical case arising under Section 2, Fourth, of the Railway Labor Act.

The fact is, therefore, that no agreement with respect to the American and TCA Pilots has been reached which meets the requirements of Section 3 of the Board's protective conditions. The APA-AA agreement, whether or not it otherwise complies with the Railway Labor Act,

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[3] Section 2, Fourth, of the Railway Labor Act (45 U.S.C. 151a) provides for collective bargaining with the employer by representatives of the employees, and further provides "that the majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purpose of this Act." Section 7 (45 U.S.C. 157) provides for arbitration of disputes which cannot be settled by conference, by the appropriate adjustment board, or through mediation.

has not been approved by the TCA Pilots, and thus is not in compliance with the Board's labor conditions. It is at best a proposal which failed. Moreover, the conduct of the petitioners surely discloses that the APA-AA agreement is a nullity. The "agreement"—or more accurately the proposal—was expressly drafted as a tripartite agreement and was tendered to the TCA-MEC for signature and acceptance. Under Petitioners' theory, this was an unnecessary gesture. In fact, of course, it was not. It was rather a recognition of their obligations under the Board's labor protective provisions.

It is also premature, and therefore erroneous, for Petitioner to say that the Board has "ignored" the APA-AA agreement. In the absence of the necessary tripartite agreement contemplated by the Board's conditions, the procedures provided by Sections 3 and 13 thereof call for arbitration of the dispute, at which time the merits of the seniority dispute will be considered. As the Board has clearly pointed out (App. A29), at that time the APA-AA agreement can be put forward as a proposed solution of the dispute. At that time the agreement presumably will receive such consideration as the merits of the proposal may warrant.

Thus, to put it bluntly, the two-party agreement is *irrelevant* at the present *procedural* stage of the dispute. It follows that the failure of the Board to give "weight" to the agreement was not adverse to or in conflict with the national labor policy, and that the lower court's decision upholding the Board's action does not raise questions warranting review by this court. On the contrary, the Board's action is consistent with national labor policy. As this court made clear in *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964), national labor policy favors collective bargaining and arbitration. The Board's conditions are wholly consistent with this policy, and the

Petitioner's objections relate to minor procedural objections and red herrings introduced by Petitioner itself.[4]

It must be noted that Petitioner's objection (that the Board as a matter of law must itself resolve the dispute rather than compel arbitration) is trivial at best. In the absence of voluntary agreement to arbitrate, settlement of the dispute by the Board is just as compulsory as settlement by compulsory arbitration. Moreover, a charge that the Board failed to give weight to the two-way agreement *prior* to the consideration of the seniority dispute on its merits represents an objection merely to the question of *timing*, since the Board has said (App. A29) that the agreement *can* be considered by the arbitrator when the merits of the dispute are reached. Thus, consideration of the agreement has merely been deferred to a later stage, and no important question of national labor policy is involved.

2. *Contrary to Petitioner American's assertion, the viability of negotiations as a means of settling disputes in airline merger cases is not impaired by the decision below.*

Petitioner American argues (Pet. No. 71-550, 9-13) that the procedures adopted by the Board in this case and approved by the court below fail to reconcile the policies of the Federal Aviation Act and the Railway Labor Act, and therefore "pose a serious threat that non-governmental compulsory arbitration will supplant negotiation as the means by which virtually all seniority list integration disputes between all types of airline employ-

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[4] *McGuire* v. *Humble Oil and Refining Co.*, 355 F. 2d 352 (C.A. 2, 1966), cited by Petitioner APA (Pet. No. 71-489, 9), is not to the contrary. The merger there was not subject to the approval of a regulatory agency vested with authority to impose just and reasonable protective conditions as the circumstances may require. The question before the court in *McGuire* involved the construction of a pre-existing collective bargaining agreement in the light of national labor policy.

ees will be resolved in future merger cases." The argument is founded on the contention that the Board, before opting for compulsory settlement of the dispute, must first consider the collective bargaining agreement between the carrier and the majority representative of the employees.

American's argument, which tries to force the present case into the mold of the Railway Labor Act, fails to recognize that airline merger cases give rise to labor disputes which are unlike the typical case arising under that Act. Under the Railway Labor Act negotiation and agreement between the collective bargaining representative and the employer is a proven and sound method of resolving disputes. But in airline merger cases a seniority labor dispute is a tripartite dispute involving the surviving carrier and two formerly separate employee groups. The Board's standard labor protective conditions and its procedures in the present controversy properly recognize this important and practical consideration.

Contrary to the implication in the Petitions, the actions of the Board in the present case do not represent a departure from its past procedure—a procedure evolved from the consideration and disposition of numerous airline merger cases. The courts and the Board have both recognized in earlier cases that the procedures under the Railway Labor Act should not be routinely followed where two or more employee groups in a merger have conflicting interests. In *Braniff-Mid-Continent Merger Case*, 17 C.A.B. 19 (1953), the Board was confronted with an agreement between the carrier and the representative of one of the conflicting employee groups over the objections of the other group. The Board there held as follows (17 C.A.B., at 21-22):

> ". . . we interpret section 3 of the Board's order as requiring Braniff to negotiate with the two groups of dispatchers, and to submit to arbitration in the absence of a negotiated agreement. For the purpose

of carrying out the provisions of section 3 of the order, it is immaterial as to who is the certified representative, within the meaning of the Railway Labor Act. For, regardless of which representative is certified, there will still remain a dissident group, and *we are unwilling to allow our protective conditions to be used as a means for allowing one group to dominate the other.*

"The very purpose of the protective condition regarding integration of seniority lists is to insure that the merger will not unduly interfere with the seniority rights of the affected employees. Where, as here, Mid-Continent has disappeared as an entity, *it would frustrate our protective condition if the Braniff dispatchers were permitted to dictate the seniority rights of the Mid-Continent dispatchers.* Similarly, our protective condition would be defeated if we were to permit the Mid-Continent group of dispatchers to dictate seniority integration for the Braniff dispatchers. Accordingly, we have provided for negotiation and ultimate resort to arbitration, so as to protect the rights of both groups of employees" (footnotes omitted; emphasis added).

Similarly, in *Kent* v. *Civil Aeronautics Board*, 204 F.2d 263 (C.A. 2, 1953) *cert. den.* 346 U.S. 826, the court held that a collective bargaining agreement, made by the union bargaining agent of the carrier's employees, must yield to the paramount power of the Board to provide a solution which takes into consideration the conflicting seniority interests of both the majority and minority employee groups. These views of the court and the Board are inherently sound, and are not inconsistent with the Railway Labor Act and national labor policy of settling disputes by negotiation and arbitration.[5] In a sense, the

[5] *Outland* v. *CAB*, 284 F. 2d 224 (1960) relied on by the Petitioner, is not to the contrary. The fact that the Board did not choose to look behind the collective bargaining agreement in that case does not require it to follow that course in all cases regard-

Board's actions go beyond the Railway Labor Act in recognizing the tripartite nature of the labor dispute. But in providing for collective bargaining between affected employees and the employer, and for arbitration if negotiations fail, the Board's protective conditions are consistent with national labor policy. *John E. Wiley & Sons* v. *Livingston, supra.*

In the absence of approval of the APA-AA agreement by TCA-MEC, it is patently unsound to argue, as American does (Pet. No. 71-550, 11), that the agreement, which has status only as the proposal of two of the three parties, *must as a matter of law* be acted on by the Board before any other procedural step could be taken.[6] We need not decide whether the Board lawfully could have given priority to the APA-AA proposal over all other proposals which might be considered by the arbitrator in the arbitration proceeding. But we submit that it is absurd to argue that the Board was guilty of legal error in refusing to give preferential priority consideration to one of many possible solutions in advance of the arbitration proceeding.[7]

American seeks to establish the importance of the issue it raises by expressing fears (Pet. No. 71-550, 11)

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less of circumstances. But of even greater importance is the fact that in *Outland*, unlike the present case, the representative of the minority had agreed to the manner of integration. For what American describes as an "integration of seniority lists . . . negotiated . . . by the parties" in *Outland* was an integration negotiated by the two respective pilot groups—not by the company and one group.

[6] American professes dismay that the Board's action required the seniority question to be "submitted anew, as if no negotiations had occurred and as if no agreement had been reached." (Pet. No. 71-550, 10) In fact, the issue had not been "submitted" before and the "agreement" constituted a mere proposal.

[7] Indeed, it would follow from American's argument that even if the Board had decided to resolve the seniority issue itself, the Board was required as a matter of law to give priority consideration to the two-party agreement.

that the knowledge that compulsory arbitration is inevitable in the absence of agreement by all groups "will effectively impair the motivation of both majority and minority groups to reach reasonable agreements during negotiations". American's fears are groundless. Agreements have been reached in the past despite the "threat" of compulsory settlement by an arbitrator or the Board.[8] Out of a total of twenty-one prior flight crew seniority cases, settlement by agreement was reached in nine cases, by mediation in one, and by arbitration in ten. Record, 179a. In only one prior case (*Braniff-Mid-Continent Merger Case, supra*) has the majority representative had the temerity to assert the power to determine the rights of a minority group of employees by entering into a collective bargaining agreement with the carrier, and in that case the assertion was firmly rejected by the Board. Thus since 1952 seniority rights have been successfully determined by negotiation or arbitration despite knowledge by carriers and employees of the principles of *Braniff*.[9]

3. *No significant questions concerning unlawful delegation of the Board's decision-making responsibilities are involved.*

Relying on provisions of the Federal Aviation Act (49 U.S.C. 1301), Administrative Procedure Act (5 U.S.C. 556(b)) and Reorganization Plan 3 of 1961 (26 F.R.

[8] Moreover, American's arguments concerning motivation seem equally valid where the parties have voluntarily agreed to arbitrate if no agreement is reached.

[9] *Burlington Truck Lines* v. *United States*, 371 U.S. 156 (1962), relied on by American (Pet. No. 71-550, 10), does not point to a different result. In the present case, unlike *Burlington*, (1) the Board's order does not encroach on the jurisdiction of a sister agency, (2) the Board's order recognizes its lack of expertise in labor matters, and (3) in fashioning its standard conditions the Board not only weighed the consequences of allowing a majority group to override a minority group (*Braniff-Mid Continent-Merger Case, supra*), but arrived at a solution consistent with national labor policy.

5989), Petitioners argue that the Board can not lawfully delegate its decision-making power to private parties, such as an arbitrator, and that the provision here for settlement of the seniority issue by arbitration is therefore unlawful.

Petitioners misconceive the nature of the Board's action in providing for arbitration. The Board's responsibility under section 408 of the Federal Aviation Act is to decide whether a proposed merger arrangement is in the public interest. This responsibility it cannot delegate, and has not delegated. But having decided the statutory issue and approved the merger, it also has the power, and indeed the responsibility, to impose "such terms and conditions as it shall find to be just and reasonable". 49 U.S.C. 1378(b).

There is no prohibition in the Federal Aviation Act, or elsewhere, which precludes the Board from discharging its responsibility by providing, as it did in sections 3 and 13 of the labor conditions, for negotiation and, on failure to agree, arbitration, and such procedures are consistent with national labor policy. Although facts and circumstances in a particular case may render such an arrangement unjust or unreasonable, in the present case the court below correctly found that the Board's choice of arbitration was proper. The basic reasons are the Board's lack of expertise in labor matters [10] and the fact

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[10] American asserts that, while the Board may be inexpert in labor matters, it does possess peculiar knowledge of airline operations—and an evaluation of such issues is essential to resolving the existing dispute. Pet. No. 71-550, 14-15. The Board certainly does have expertise in the latter area—but so do a number of arbitrators, who *also* have expertise in labor matters. Unfortunately, Petitioner APA has made it plain, before the Board and in the Court below, that any arbitrator with such experience is unacceptable, and American has acquiesced in APA's view. App. A15, A16, A20. Petitioners should scarcely be allowed to rely on the expertise ground just because they elect to rule out any person or agency with expertise, except for the Board.

that seniority is basically a matter for negotiation or arbitration. (App. A37)

Petitioners' contention that reconciliation of the interests of labor groups is a decision-making function which cannot be delegated is inconsistent with their support of the principle of negotiation as a cornerstone of national labor policy. If the decision must be made by the Board, that responsibility cannot be "delegated" to the interested parties—American, APA and TCA-MEC—for settlement by negotiation and agreement, any more than it can be delegated to an arbitrator. Petitioners cannot have it both ways.

Petitioner American is also troubled by the fact that no "guidelines" have been prescribed by the Board. But as the court below points out (App. A20), the arbitrator "must apply the same standard, 'the integration of seniority lists in a fair and equitable manner,' by which an examiner of the Board would be bound." Both the Board and the court below found that "American's fears with respect to the conduct of the arbitration are exaggerated." (App. A19).[11]

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[11] American cites as indefinite issues the following: (1) the identity of employee representatives; (2) the method of arbitrator selection; (3) the issues for the arbitration; and (4) the location of the arbitration (Pet. 15-16). The contentions are ingenuous. First, long before the petitions were filed, TCA MEC agreed to supply signed authorizations from each individual pilot it purports to represent, eliminating the first "vexing" area. Second, long before the petitions were filed, the parties agreed on a method of arbitrator selection. If that method proves abortive—and if there is a dispute as to the Board's intention—any party has the right to return to the Board for a clarification order, but that is a far cry from putting the whole problem back in the Board's lap. Third, the issues to be arbitrated are spelled out in the Board order—"all pending disputes with respect to the seniority list integration of the American and TCA pilots and flight engineers." (App. A39). And fourth, the location of the arbitration is obviously a frivolous objection; that decision is seldom made until an arbitrator is chosen, and the arbitrator's preference is customarily given great weight.

4. In any event the court below properly found that the appeal attacking the Board's "delegation" to an arbitrator was untimely.

The order of the Board, Order 70-12-161, imposing protective labor conditions, including sections 3 and 13 relating to negotiations and arbitration, was served on December 31, 1970. Record, 24a, 134a, 137a, 140a. American's Petition for Review was filed on June 18, 1971, seeking review of two orders of the Board, dated May 7, 1971, and June 11, 1971, which sought to implement the order of December 31, 1970. No appeal was taken from the order of December 31, 1970.

If the Board lacks authority to "delegate" a seniority dispute to a non-governmental arbitrator, the Board's unlawful delegation occurred on December 31, 1970. American cannot take advantage of the merger approval and withhold appeal of particular provisions or conditions of the approval until such time as it decides they are disadvantageous. *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492. Clearly the question of the Board's legal power to "delegate" should have been appealed within the statutory 60-day period. 49 U.S.C. 1486(a). Having failed to do so, the arbitration provisions are unassailable on appeal.[12]

5. The ruling of the court below that Petitioner APA is bound by the Board's order because of APA's intervention in the Board proceeding is correct, but in any event is not essential to the lower court's decision. The Board has broad powers to deal with labor relation

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[12] It should be noted that the petition of the TCA MEC, filed February 2, 1971 (Record, 143a) to which both Petitioners refer, expressly stated that it was invoking condition 13 by demanding arbitration of a dispute that had existed for 30 days (i.e., since December 31, 1970). American and APA were thus on notice well in advance of the 60-day deadline that TCA MEC construed the order imposing the labor protective conditions exactly as did the Board and the court below.

problems growing out of airline mergers, and its order could not be frustrated by the failure or refusal of APA to intervene. As the court below said (App. A21): "To say that the Board could direct an arbitral resolution but not make that resolution binding on all concerned parties would leave the Board with powers that would be more apparent than real".

Moreover, the court's ruling on intervention is correct and unexceptionable. Petitioner cannot escape the normal and universal rule that a party in an adjudicatory proceeding, whether before a court or an administrative agency, is bound by the order of the tribunal or agency.[13] Orderly procedure so requires. It would indeed be intolerable to give opportunity to a party to present its evidence and contentions, and to reach a final order based in part on such presentation, only to discover that such "order" had no higher status than an advisory opinion with respect to some of the parties.

The argument that the ruling is novel and farreaching, and will discourage participation in administrative proceedings, seeks to prove too much. A merger proceeding fixes legal rights and obligations, and is not a mere fact-gathering investigation; nor does the greater "informality" of administrative agency proceedings negate the agency's authority to issue final orders determining such rights and obligations.[14]

Petitioner APA additionally but erroneously contends that the Board lacks jurisdiction to bind APA because

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[13] APA's strained distinction between intervention in a judicial proceeding and intervention in an administrative proceeding eludes us. APA *has* intervened in the litigation in the court below and is bound by *that* decision, without considering its status before the Board.

[14] Contrary to Petitioner's belief (Pet. No. 71-489, 27), the fact that *some* intervenors in administrative proceedings do not have an appealable interest is of no significance to the present controversy. Respondents here have not contested Petitioner APA's right to appeal from the Board's order.

it lacks jurisdiction over the "subject matter". Petitioner apparently means that the Board has power to approve merger agreements (and thus has jurisdiction over American), but has no direct statutory power to compel APA and other labor groups to arbitrate if negotiation fails (and thus has no jurisdiction over APA). But this ignores the fact that the "subject matter" includes labor protective conditions, that these are directed to American, and that the impact on APA derives from the directive to American. Having participated in the administrative process of formulating the order, APA is bound by it.[18]

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[18] Since the preparation of this brief, this Court on November 15, 1971, handed down its opinion in *Norfolk & Western Ry. Co.* v. *Nemitz*, No. 70-97. The Court there held that a pre-merger labor agreement, which had been approved by the Interstate Commerce Commission as part of the merger transaction and thus became one of the conditions of the merger, could not be abrogated by a subsequent implementing agreement between the employer and authorized representative which substantially and adversely modified the compensation to be paid a minority group of employees. Although the case involved specific statutory provisions of the Interstate Commerce Act (sec. 5(2)(f)), the Court's decision supports the action of the Board and the Court below in this case: (1) The responsibility of the Commission in a merger case to impose and oversee protective conditions for minority employees, despite efforts to override the interests of such employees through recourse to the collective bargaining procedures of the Railway Labor Act, is clearly established; (2) The subsequent implementing agreement (comparable to the APA-AA agreement here) was held to be unenforceable and contrary to the Interstate Commerce Act.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of November, 1971, copies of the Brief in Opposition for Intervenor-Respondent Master Executive Council of the Pilots of Trans Caribbean Airways were mailed, postage prepaid, to the following:

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I further certify that all parties required to be served have been served.

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